IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 27, 2009

STATE OF TENNESSEE v. BRADLEY W. CHAPMAN

Appeal from the Criminal Court for Sullivan County
Nos. S52,237 and S55,040 Robert H. Montgomery, Jr., Judge

No. E2009-00054-CCA-R3-CD - Filed February 25, 2010

The defendant, Bradley W. Chapman, contests the Sullivan County Circuit Court's denial of alternative sentencing. The defendant pled guilty to the following: (1) in case S52,237- attempted aggravated child abuse and attempted aggravated child neglect, both Class B felonies; and (2) in case S55,040- three counts of especially aggravated sexual exploitation of a minor, Class B felonies; eight counts of aggravated sexual exploitation of a minor, Class C felonies; seven counts of statutory rape, Class E felonies; and possession of drug paraphernalia, a Class A misdemeanor. Pursuant to the agreement, he received effective sentences of ten years in each case, which were to be served consecutively, with the manner of service to be determined by the trial court. Following a hearing, the court ordered that the sentences be served in the Department of Correction. On appeal, the defendant challenges the trial court's denial of alternative sentencing, both probation and community corrections. He further asserts that the trial court committed reversible error by applying inappropriate enhancement factors, as well as by not properly balancing enhancement and mitigating factors. Following review of the record, we conclude no reversible error exists and affirm the sentences as imposed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Richard A. Spivey, Kingsport, Tennessee, for the appellant, Bradley W. Chapman.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Barry P. Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The underlying facts of the cases, as recited by the State at the guilty plea hearing, are as follows:

> I'm going to begin with S52,237 and the State's proof would be that Aaron Blevins, a Detective with the Bristol Police Department, responded to Johnson City Medical Center on February the 11th of 2006 on report of a [four-month-old] child who had sustained some injuries and that child is named within the presentment and the date of birth as contained there is the same child as named in the [presentment]. And as a result of the call Detective Blevins responded and spoke with a Dr. Smalligan who was the treating physician at Johnson City Medical Center. And his testimony would be that the child had been admitted somewhere on the 9th or 10th of - - - the 10th of February at Bristol Regional Medical Center and transferred for treatment at the Johnson City Medical Center. His testimony, if there had been a trial, would be that the child suffered from a swollen fontanel and retinal hemorrhages to both eyes.
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> Also, if there had been a trial Dr. Janet Brown, an ophthalmologist, would have testified, again, that the child suffered from retinal hemorrhages and it would have been the result of severe shaking enough to cause bruising of the inside of the eyes.
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> The child was also sent for referral to a Dr. Carlson. He is a pediatric ophthalmologist and, again, if he had been called to testify he would have stated that the child did suffer from retinal hemorrhages caused from shaking motions, severe shaking motion to sustain those injuries to the eye.
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> Dr. Mary Ann Neal, a pediatric radiologist, also looked at the films and she concurred that this was a shaking [stet] baby syndrome situation with retinal hemorrhages and she also found that there had been a broken bone, one signal [sic] broken bone in the victim's foot.
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> The mother of the child was interviewed. She stated that the child did get sick for approximately six weeks. She noticed some grumpiness and change in its behavior. Both the defendant and - - - the defendant was the father of the child. The father and mother were not married but they were living together at a residence in Bristol, Tennessee, Sullivan County, and she denied doing anything that would abuse the child. She admitted that the father on occasion had a temper [and] she had seen the child being tossed on the bed on one occasion. Subsequently the defendant was interviewed and he knowingly and voluntarily gave a written statement which he stated that on one occasion the baby would not quit crying, he held the baby away from him and shook him while the baby was upset and he did not think the shaking

of the child was hard enough to hurt him. And that essentially would be the proof in that particular, in S52,237, Your Honor, if there had been a trial.

Now, in 55,040, the State's proof would be there had been referral from the victim's mother in that particular case about suspicion of alleged sexual activity between her daughter and the defendant and the daughter's name and age is contained in the presentment. She was a minor and the defendant was more than [four] years older than her. They had a boyfriend/girlfriend relationship and as a result of that referral Marshall Crank with the Sullivan County Sheriff's Department went to the victim's - - - interviewed the victim and she gave a statement in which she, and her expected testimony would be, that she and the defendant had [ ] a sexual relationship on several occasions and those occasions are set out in the presentment and they all occurred in Sullivan County at the defendant's residence, at that time in Piney Flats, Sullivan County, Tennessee. She also alleged that the defendant had taken photographs of her in a nude state and that he was the one, the individual that took the photographs, and that not only did he take photographs but on other occasions he had distributed photographs of her, and also of himself nude, to her and other individuals. And as a result of that information a search warrant was conducted of the defendant's residence in Sullivan County and a computer was obtained and those photographs were found and the State, if there had been a trial, would have submitted those images from the computer owned by the defendant that contained those images. And the State's proof would be that February 4th was the date the photographs of the victim were taken by the defendant in Counts One through Three and Four through Seven, that on the 15th of January, as these were when the four separate images were exchanged between the victim and the defendant via My Space. And in Counts Eight through Eleven on January the 19th images again were exchanged and distributed through the Internet by the defendant and the State would submit that on Counts Twelve through Eighteen the defendant did sexually penetrate the victim at his home on those particular dates which would be January 9th - - - - I mean September the 1st, 6th, 15th, November the 18th, December 1st, December 28th, and January 21st. The State would also submit that by the execution of the search warrant a pipe and papers were found that were consistent with the type used for the ingestion and use of marijuana. And that would be the State's proof if there had been a trial in this case, Your Honor.

. . . .

There would be proof if there had been trial that the mother had told the defendant not to be around her daughter because she was suspicious of his behavior and that she [had] been advised that he would - - - - that he [would not] have any contact with her and of course the victim's testimony would be that subsequent to that warning that in fact that she went to his residence where they did have sexual activity.

Based upon the foregoing, the defendant was charged by presentment in S52,237 with aggravated child abuse and aggravated child neglect. He was charged in S55,040 with three counts of especially aggravated sexual exploitation of a minor, eight counts of aggravated sexual exploitation of a minor, seven counts of statutory rape, and one count of possession of drug paraphernalia. He subsequently pled guilty to attempted aggravated child abuse and attempted aggravated child neglect in case S52,237, and he pled as charged in case S55,040. Pursuant to the agreement, the defendant was sentenced as a Range I, standard offender to effective ten-year sentences in each case, which were to be served consecutively. The agreement also provided that the manner of service was to be determined by the trial court.

At the subsequent hearing, both the defendant and his father testified. The defendant's father, while acknowledging that the defendant had done so, stated that he just could not believe that his son had abused his grandson. Mr. Coleman testified that the defendant had since taken anger management and parenting classes. He went on to testify that he and his wife, along with the child's maternal grandparents, now shared custody of the child, whom he stated was "one hundred percent okay." He did acknowledge, however, that there had been concern over whether his grandson would lose his vision. Mr. Coleman testified that the defendant would return to live with his parents should he be given an alternative sentence and that Mr. Coleman would provide the defendant a job with his company if necessary. The defendant read a letter into the record in which he apologized to his son, the minor child with whom he had shared a sexual relationship, the families, and the court.

The State called no witness but, instead, relied upon the psychosexual assessment and the presentencing report. The report noted that the defendant was at a low risk to reoffend. The presentence report indicated several prior traffic offenses, including two convictions for driving with a suspended license and reckless driving.

After hearing the evidence presented, the trial court ordered that the sentences be served in confinement. The defendant timely appealed.

Analysis

On appeal, the defendant contests the trial court's decision that his sentences be served in confinement. Specifically, he contends that the trial court committed reversible error by: (1) denying the defendant probation and/or alternative sentencing; (2) applying inappropriate enhancement factors; (3) finding that the defendant was not eligible for community corrections; (4) finding deterrence as a basis for denying an alternative sentence; and (5) not giving appropriate weight or properly balancing any enhancement factors with mitigation factors. For ease of review, we will combine the defendant's issues.

When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d)

(2006). The burden is on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported by the record, and gave due consideration to the factors and principles that are relevant to sentencing, we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994). In conducting a *de novo* review of a sentence, we must consider: (1) any evidence received at the trial and/or the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement factors; (6) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses; (7) any statements made by the defendant on his or her own behalf; and (8) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210, -103 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The 2005 sentencing amendments deleted the sentencing provision granting a defendant a presumptive favorability for an alternative sentence. Under the 2005 amendments, a defendant convicted of a Class C, D, or E felony and sentenced as a standard or mitigated offender "should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6). Evidence to the contrary may be established by showing that: (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct; (2) confinement is needed to avoid depreciating the seriousness of the offense, confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses; or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. *Ashby*, 823 S.W.2d at 169 (citing T.C.A. § 40-35-103(1)(A)-(C)). However, the statute specifically states that "[a] court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6).

In making its determination, the trial court shall also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. § 40-35-210(b)(5) (2006); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). In addition, a trial court should consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. T.C.A. § 40-35-103(5); *Boston*, 938 S.W.2d at 438.

We note that the defendant was convicted of multiple Class B felonies, which precluded his entitlement to be considered as a favorable candidate for alternative sentences with regard to those convictions. Nonetheless, he remains eligible for an alternative sentence because his sentences were ten years or less and the offenses for which he was convicted are not specifically excluded by statute. *See* T.C.A. §§ 40-35-102(6), -303(a) (2006).

Although probation must be considered, "the defendant is not automatically entitled to

probation as a matter of law." T.C.A. § 40-35-303(b), Sentencing Comm'n Cmts; *State v. Hartley*, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). Rather, a defendant is required to establish his "suitability for full probation." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see also* T.C.A. § 40-35-303(b). A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 29 S.W.3d 1, 9-10 (Tenn. 2000)). Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

In imposing a sentence of confinement in this case, the trial court found, in relevant part, as follows:

> All right, . . . my responsibility as Judge is to look at the evidence that I received at trial or the guilty plea in the sentencing hearing, the presentence report, the principals of sentencing, the arguments that your lawyer, as well as the State has made, nature and characteristics of the criminal conduct involved, evidence of enhancing and mitigating factors, anything that you may have said on your own behalf. Now, [I have] had a chance to read both the presentence report as well as the evaluation by William Stanley that your attorney talked about just a moment ago.
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> Now, if you look at the enhancing factors that I find, first of all I find enhancing factor number one, the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. Now, the prior criminal convictions are referred to on pages 9, 10, and 11 of the presentence report; driving without a license, driving on a suspended license, another driving without a license, reckless driving, all essentially traffic related offenses. Also it appears, based on the record and what your attorney said, there apparently was a domestic assault charge alleged to have occurred sometime in May of [2006] that was placed on - - - you were released out in the community, though it was not a conviction, for apparently one year and at the end of that period of time it was dismissed in July of 2007.
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> Now, I also find, too, that you have prior criminal behavior and the criminal behavior would include the use of marijuana. Now, it states on page 13 of the presentence report that you did not like marijuana and denied any use of the drug since the age of 17; however if you look at the report prepared by Mr. Stanley on page 5 of the report it refers to the fact that he repeatedly began to use marijuana socially about the age of 16 or 17 and continued to do so until June of 2007. So it would appear that [there is] a conflict between what he told the probation officer denying basically the use of the drug since the age of 17 and what he told Mr. Stanley in which he said he used the drug basically until June of 2007, which would mean

that he would have been 24 at the time. So apparently [there is] a 7 year use of marijuana that he [did not] tell the probation officer about but apparently was using it, so I find that that use of marijuana and apparently over a long period of time is criminal behavior, so I have to take that into consideration. Also in his report to Dr. Stanley he refers to the fact that at least on one occasion he had also snorted Xanax apparently without the benefit of having a prescription, so again that would also be criminal behavior. So I do find that enhancing factor.

Enhancing factor number . . . four, the victim of the offense was particularly vulnerable because of age or physical or mental disability and I find that first of all with regard to his child because [we are] dealing with a child under the age of, at this time just several months old. Obviously the child is not in a position of resisting the crime and in my opinion it made the child more a target. It [could not] tell what was wrong with it. It [could not] explain any of the things that, the damage that was happening to it. There was nobody else, no way for him to respond to that and so I find that the child was particularly vulnerable because of his age and therefore I find that enhancing factor so I find enhancing factor number four.

I also find, too, that the child - - - - I also find enhancing factor number four with regard to the child where it was charged with the - - - - the especially aggravated sexual exploitation and the aggravated sexual exploitation and the statutory rape. I found that the child was, that child was particularly vulnerable, had lost a family member, if [I am] remembering right, to suicide, and because of that vulnerability and because she [did not] really have the ability to express that concern I find that enhancing factor as well.

I find enhancing factor number six, the personal injury inflicted was particularly great. Now, in this - - - - with regard to his own child. The defendant has pled guilty to attempt to commit aggravated child abuse. Serious bodily injury is not an element of an attempt and so therefore I find in this particular case that the personal injury inflicted was particularly great. The testimony here today was that there was a question as to whether or not even the injuries might have led to blindness and/or the possible death. So I find that the, again, because [he has] pled to an attempt to commit aggravated child abuse, that enhancement factor number six applies.

Enhancement factor number seven applies with regard to the charges of the [statutory] rape, especially aggravated sexual exploitation of a minor because the offense was committed to gratify the defendant's desire for pleasure or excitement. I mean he admitted here that the pictures were taken for his own personal use, [that is] contained in the report, and so I find based on the evidence [I have] heard here today that enhancement factor number seven applies in that particular case.

Number eight, the defendant before trial or sentencing failed to comply with the conditions of a sentence involving release in the community. Now, [it is] hard to know whether or not that actually applies in this case on that domestic violence offense. That was alleged to have occurred in May of [2006]. It was not dismissed until July of [2007]. Typically those are reset for a year. It would have been during that time period that these offenses in 55,040, the especially aggravated sexual exploitation of a minor and the statutory rape occurred. [I am] not going to find that because [I am] not sure that [ ] actually fits in enhancing factor number eight.

I find enhancing factor number ten in 52, 237, the defendant had no hesitation about committing a crime when the risk to human life was high. It was not more than one time; it was several times. The child, after - - - - was taken to the physician several times after these offenses occurred so it would appear the defendant continued to commit that crime. [There has] been testimony here today that the amount of shaking involved was just like a car wreck so I find enhancing factor ten with regard to 52,237.

Enhancing factor thirteen, at the time the felony was committed one of the following classifications was applicable to the defendant; he was released on bail. Now that would have been he was released on bail in 52,237 when the offense in S55,040, with regard to the sexual exploitation and the statutory rape occurred and [he has] been convicted now of both these felonies. So I find that enhancing factor applies in 55,040.

Number fourteen, the defendant abused a position of public or private trust or used a professional license in a manner that - - - - well, that [does not] apply but the first part, abused a position of private trust, I find that applies with regard to his child. Again, he had a special relationship with that child and so I find that enhancing factor, that when he was alone with the child was when these offenses occurred and the child, he had a responsibility over that child and he abused that position of private trust.

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All right, I find in this particular case, I find that the enhancing factors far and away outweigh the mitigating factors in this case. I also find that there [are] credibility issues on behalf of the defendant; when you look at the fact in one report he says that he stopped using marijuana because he [did not] like it at age 17 and the other one he continued to use it up until the age of apparently 23, so [there are] some credibility issues. I also find, too, that the defendant, while you talk about charges like driving on a suspended license or driving on a revoked license, that those are not charges that, you know, are serious in and of themselves, yet they show to me that the defendant is an individual that is going to continue to do things even though he's

been ordered by like the Department of Safety or a judge not to drive, [he is] going to continue to drive. I mean [it is] not unlike what happened in the incident involving the sexual exploitation of a minor. He was ordered or told by the child's mother not to have any contact, not to go around her, ordered by a police officer not to have any contact with her, not to go around her, and yet he chose to continue to do those things and not only go around them but to violate the law, I mean to the point of actually taking pictures for his own personal benefit and enjoyment and to use that on his computer and to pass that around with the victim in this case. It seems to me that you add all of this together, that the defendant has a long history of criminal conduct and that he has an extensive criminal history now based upon these pleas here today. I also find, too, that these are serious offenses. I mean one of them, the attempt to commit aggravated child abuse is probably the greatest abuse of private trust that there can be, for a father to shake his child to the point that not only could cause blindness but also lead to death; that for me to do other than placing you in confinement just essentially avoid the - - - - would depreciate the seriousness of these particular offenses and that in my opinion there is a deterrent value to come from these and the deterrence of course is to others to be aware that indeed taking pictures and passing those pictures around to others, I mean over the Internet rather, is pretty - - - - is egregious. I also find, too, that there is - - - - that the public needs to be aware of the consequences of abusing a child, your own child; that [it is] not just enough to say, "Well, I [did not] know." . . .

Anyway, in my opinion, this is a case in which confinement is necessary to protect society [from] someone with a long history of criminal conduct and so [I am] going to deny your request for probation or alternative sentencing based on everything [I have] seen in this case. . . . And I [do not] think community corrections is appropriate either based upon the fact that one involves an assaultive type charge and [I have] not seen what I consider to be special needs that are better addressed in the community.

I. Enhancement Factors/Balancing

First, the defendant challenges the trial court's consideration of four particular enhancement factors, as well as the court's balancing of enhancing and mitigating factors in its imposition of confinement. We note that the defendant is not challenging the length of the sentence imposed, as it was an agreed sentence pursuant to the plea agreement. The 2005 amendments to our sentencing act greatly broadened the discretion afforded the trial court in its consideration of statutory enhancement and mitigating factors. *State v. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008). "[A] trial court's weighing of various mitigating and enhancement factors has been left to the trial court's sound discretion. Since the Sentencing Act has been revised to render these factors merely advisory, that discretion has been broadened." *Id*. at 345.

The defendant challenges considerations of: (1) factor (4), the particular vulnerability of the victim in both cases based upon their age or mental state, asserting that the factor is "elemental" to both; (2) factor (6), that the personal injuries inflicted on the defendant's son were particularly great, asserting that it was not established by the proof; and (3) factor (14), abuse of a position of private trust based merely on the existence of a familial relationship. *See* T.C.A. § 40-35-114 (4), (6), (14) (2006). He makes no challenge to the court's application of the additional factors applied, and we note those factors were appropriately applied.

With regard to factor (4), we do agree that consideration of this enhancement factor is precluded if it is an element of the offense. *See* T.C.A. § 40-35-114. However, while the age of the victim alone does not justify application of the "particular vulnerability" factor, the inclusion of an age element in the statutory offense does not preclude the application of the factor. *State v. Walton*, 958 S.W.2d 724, 728 (Tenn. 1997). In considering this factor, a trial court is required to determine, as a factual predicate, whether the age or condition of the particular victim prevented the victim from resisting the criminal activity, summoning help, or testifying against the perpetrator. *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997). The trial court's statements on the record indicate that such a factual predicate was established with regard to the defendant's son. The court considered that the defendant's child was four months old at the time and was in no position to resist the crime, to divulge what had occurred, or to explain the resulting damage inflicted by the defendant. However, we are unable to conclude that the trial court's finding with regard to the victim of the sexual offenses is supported. The court based its finding not upon her age but rather finding that she was particularly vulnerable due to the loss of a family member to suicide. The record simply does not support this conclusion, as the court failed to establish that the loss of the victim's family member in any way prevented her from resisting the criminal activity, summoning help, or testifying. Thus, the court erred in applying this factor in determining these sentences.

The defendant's argument regarding factor (6) is supported by nothing other than his assertion that the proof fails to establish the factor because the record indicates that the defendant's son, in fact, recovered from his injuries. However, this ignores the proof in the record that the defendant repeatedly and violently shook his child, causing retinal hemorrhaging and a swollen fontanel, and a statement by one physician stating that this was "the worse case of shaken baby syndrome she had even seen." It has been held that "proof of serious bodily injury will always constitute proof of particularly great injury," *State v. Jones*, 883 S.W.2d 597, 602 (Tenn. 1994), and a serious bodily injury is defined as injury which involves "a substantial risk of death, protracted unconsciousness," "extreme physical pain," "protracted or obvious disfigurement," or "protracted loss of substantial impairment of a function of a bodily member, organ or mental faculty." T.C.A. § 39-11-106(a) (34) (2006). The injuries inflicted upon the defendant's son fulfill the requirements of that statute.

Finally, the defendant relies upon *State v. Gutierrez*, 5 S.W.3d 641 (Tenn. 1999), for the proposition that merely relying upon a parent/child relationship cannot establish this factor. In *Gutierrez*, our supreme court held that adult cohabitants do not by virtue of living arrangement create a private trust. *Id*. at 645. However, the court went on to note that where an adult perpetrator and

a minor child are members of the same household, the relationship between the two creates a "presumptive private trust." *Id*. We agree with the trial court that the record sufficiently established that relationship in this case. The defendant, his girlfriend, and the victim's grandparents all lived together and were responsible for the care of the infant. We agree that a special relationship was established.

In summary, we find no error in the trial court's consideration of the enhancement factors with regard to the defendant's convictions for attempted aggravated child abuse and attempted aggravated child neglect. However, with regard to the remaining convictions, we have concluded that the trial court erred in applying the factor finding the victim to be particularly vulnerable. Nonetheless, review reveals that the sentences, as imposed, are supported by the record based upon the court's finding of the remaining appropriately applied enhancement factors. Moreover, the defendant's argument with regard to the balancing of enhancement and mitigating factors is misplaced as review of a court's decision in weighing enhancement and mitigating factors has been removed. *See Carter*, 254 S.W.3d at 345.

II. Community Corrections Eligibility

Next, the defendant challenged the court's finding that the defendant was not eligible for community corrections pursuant to subsection (a) and its finding "that he would not be a special needs candidate [because it] is substantially at odds with the psychosexual evaluation and assessment," which concluded that the defendant was at a low risk to reoffend.

Tennessee Code Annotated section 40-36-106(a) provides the requirements to be eligible to receive a sentence of community corrections. One requirement is that the person be convicted of nonviolent felony offenses. Although the trial court specifically found that the child abuse conviction was one of violence, the defendant argues he should not be considered a "violent offender." We disagree. As previously noted, the defendant viciously and repeatedly shook his son, which resulted in serious bodily injury to the child.

The defendant also contends that he is eligible for a community corrections sentence pursuant to subsection (c), the so-called special needs provision. Subsection (c) provides that "[f]elony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation *due to histories of chronic alcohol or drug abuse, or mental health problems*, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter." T.C.A. § 40-36-106(c) (2006). The trial court, as noted, found that no special needs had been established, and we agree. The defendant relies upon the inclusion of his psychosexual evaluation. However, this fails to establish the type of chronic mental health problems contemplated by the statute.

III. Denial of Alternative Sentencing

Finally, the defendant contends that the trial court erred in ordering a sentence of total confinement because: (1) a need for deterrence was not established on the record as required by *State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000); and (2) the trial court failed to give due credence to applicable mitigating evidence such as an absence of a prior criminal record, admission and acceptance of guilt, the defendant's work record, and the presence of a supportive family. According to the defendant, he has "demonstrated that probation or alternative sentencing will 'subserve the ends of justice and the best interest of both the public and the defendant.'" The State and the trial court disagreed.

While we are somewhat inclined to give credence to the defendant's argument regarding deterrence as no evidence was presented of the need for such, his argument ignores that only a finding of one factor is required to order confinement. We must assume that his second argument, though unclear, is aimed at the court's finding that he was a defendant who had a long history of criminal conduct. However, review reveals that this finding is supported by the record, albeit by relatively minor offenses, as the presentence report indicates multiple traffic offenses, as well as the defendant's admission of using illegal drugs over a period of several years. Moreover, the defendant makes no argument that we can glean with regard to the court's finding that confinement was necessary to avoid depreciating the seriousness of the offense other than to state that the evidence failed to support a finding that the crime was "especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, so as to outweigh all other factors favoring probation or alternative sentencing." *See State v. Bingham*, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995), *overruled on other grounds*; *Hooper*, 29 S.W.3d at 10. While we agree that this finding is required by the court if this is the sole reason for denial of alternative sentencing and note that the trial court did not make specific findings, this finding was not the sole reason for the denial as the court also relied upon its finding that the defendant had a long history of criminal conduct. Nonetheless, we can glean from the remarks made on the record that the court felt that the incidents were especially violent with regard to the defendant's son. Moreover, we may infer from comments made that the trial court found the defendant's conduct, with regard to the victim of the sexual offenses, was reprehensible as the court specifically noted that the conduct was "egregious." Additionally, the court specifically noted that, in both cases, the defendant was repeatedly told not to commit the acts or even have contact with the victim; yet, he continued to do so.

Thus, our review reveals that the record supports the court's decision to denial alternative sentencing, as the defendant has simply failed to carry his burden of establishing his suitability for such a sentence. The mitigating evidence that he complains was not properly considered by the trial court was, in fact, mentioned and weighed in the court's decision. As noted, this court will not reevaluate the weight given evidence by a trial court. Further, as noted, the trial court considered the defendant's prior criminal history, including his admitted usage of marijuana, that the crimes in question were repeated in nature and occurred after the defendant was warned to stay away from the minor victim and not to treat his son in such a manner, the defendant's potential for rehabilitation, and the enhancement factors found applicable on the facts of the case. We must agree that, taken together, these considerations warrant the court's denial of the defendant's request for alternative sentencing.

CONCLUSION

Based upon the foregoing, the denial of alternative sentencing is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE